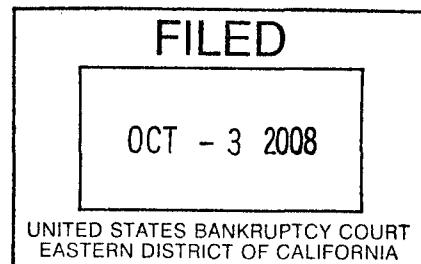


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Attorneys for TIAA-CREF



UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re: CASE NO. 05-36908-B-7
 12 THOMAS ALAN DANIEL, DC No.: DNL-3
 13 Debtor. Date: June 23, 2008
Time: 10:00 a.m.
Place: Courtroom 32

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The second amended objection of the chapter 7 trustee, Hank M. Spacone, to debtor Thomas Alan Daniel's exemptions, the trustee's request for surcharge, and the trustee's request for order compelling Teachers Insurance and Annuity Association – College Retirement Equities Fund (TIAA-CREF) to account for and remit property of the estate and property subject to levy, came on for continued hearing on June 23, 2008, at 10:00 a.m.

The chapter 7 trustee appeared by and through his attorney of record, J. Russell Cunningham of Desmond, Nolan, Livaich & Cunningham. Steven H. Felderstein and Joan S. Huh of Felderstein Fitzgerald Willoughby & Pascuzzi LLP, appeared for interested party TIAA-CREF. All other appearances were as noted on the record.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

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1 Having given due consideration to the objection, the declarations and other evidence
 2 submitted in support of the objection, any opposition and/or response filed, the record and
 3 proceedings in the above-captioned case, any stipulations recited in open court, the arguments of
 4 counsel and other interested parties at the hearing, and for other good cause shown, the court
 5 hereby finds, as a matter of fact, and/or concludes, as a matter of law, as provided under Federal
 6 Rules of Bankruptcy Procedure 7052 and 9014, in addition to any findings and conclusions stated
 7 orally on the record, as follows:

8 1. Thomas Alan Daniel's former employer, Emory University, remitted plan
 9 contributions pursuant to two (2) annuity contracts, TIAA B & CREF Q, which funded the
 10 ERISA-governed retirement plan. (June 23, 2008 Hr'g Tr. at pg. 4:24-25, pg. 5:11-12, pg. 8:8).

11 2. During his employment at Emory University, Thomas Alan Daniel also made non-
 12 plan after-tax contributions into separate After Tax Retirement Annuity Contracts, accounts
 13 TIAA D4740470 and CREF V4740477 (the ATRA contracts). (June 23, 2008 Hr'g Tr. at pg.
 14 19:7-15, pg. 9:21-22).

15 3. Thomas Alan Daniel's employment with Emory University terminated in 1983.
 16 (June 23, 2008 Hr'g Tr. at pg. 22:5-6).

17 4. On October 14, 2005, the debtor, Thomas Alan Daniel, filed a voluntary chapter 7
 18 petition. Hank M. Spacone was thereafter appointed the chapter 7 trustee of the debtor's
 19 bankruptcy case. [Docket Nos. 1, 2]

20 5. On May 8, 2006, the trustee filed his Objection to Claim of Exemption, by which
 21 the trustee objected to the debtor's exemptions claimed in: (1) 954 Q Street; (2) the defined
 22 benefit retirement plan at Washington Mutual; (3) the Emory University retirement account with
 23 TIAA-CREF; and (4) the St. Louis University 401k retirement account. [Docket No. 43].

24 6. On September 29, 2006, the bankruptcy court granted the trustee's Motion to
 25 Approve Compromise RE: Objection to Claims of Exemption. The terms of the compromise
 26 provided that only the trustee's objection to the debtor's claim of exemption for the defined
 27 benefit retirement plan at Washington Mutual would be sustained. [Docket No. 68].

28 7. On November 3, 2006, the trustee initiated Adversary Proceeding No. 06-2366

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 against the debtor, and Washington Mutual Bank, N.A., to recover funds that the debtor allegedly
 2 withdrew and concealed post-petition from the defined benefit retirement plan at Washington
 3 Mutual. [Docket No. 1].

4 8. On January 9, 2007, the trustee initiated Adversary Proceeding Nos. 07-2011 and
 5 07-2174 against TIAA-CREF, seeking to surcharge the debtor's Emory University retirement
 6 account with TIAA-CREF (07-2011), and the turnover of all accumulations in the debtor's TIAA-
 7 *Except for counts III and IV of Adversary 07-2174* CREF accounts as property that the trustee may use, sell or lease (07-2174).¹ The relief requested
 8 by the trustee against TIAA-CREF in Adversary Proceedings No. 07-2011 and 07-2174 are the
 9 same relief requested in the instant trustee's second amended objection. (June 23, 2008 Hr'g Tr.
 10 at pg. 12:16-25; pg. 13:1-22). 12/2

11 9. At a June 13, 2007, hearing on the trustee's application for a default judgment
 12 against the debtor in Adversary Proceeding No. 06-2366, the bankruptcy court granted the
 13 trustee's application. On June 22, 2007, a default judgment against the debtor was entered in the
 14 amount of \$112,297.31. [Docket Nos. 85, 87].

15 10. On June 19, 2007, the trustee's counsel contacted Ms. Margaret Byrne, associate
 16 general counsel of TIAA-CREF, to request an account freeze of the debtor's TIAA-CREF
 17 accounts. (June 23, 2008 Hr'g Tr. at pg. 23:6-14, pg. 15:20-21).

18 11. On June 20, 2007, pursuant to the request of Ms. Margaret Byrne, TIAA-CREF
 19 effectuated a stop payment on the debtor's June 13, 2007, distribution request of his TIAA-CREF
 20 accumulations. (June 23, 2008 Hr'g Tr. at pg. 23:10-14).

21 12. Based on the stop payment and re-crediting to the annuity contracts, the debtor's
 22 accumulations under his TIAA B & CREF Q annuity contracts were never transferred or
 23 liquidated. (June 23, 2008 Hr'g Tr. at pg. 24:13-15).

24 13. On June 22, 2007, the debtor's chapter 7 discharge was revoked. (Docket No.
 25 109].

26 14. On July 10, 2007, the trustee's Motion for Relief from Order Approving
 27 Compromise, which sought to vacate the trustee's September 29, 2006 exemption compromise,
 28 was granted by the bankruptcy court. The bankruptcy court denied the trustee's request for a

1 court ruling on the trustee's original objections to the debtor's exemptions without prejudice.
 2 [Docket No. 133].

3 15. On July 31, 2007, the trustee attempted to levy against the debtor's TIAA-CREF
 4 accounts in execution of the \$112,297.31 judgment by serving a Writ of Execution and a Notice
 5 of Levy on the debtor and TIAA-CREF. (June 23, 2008 Hr'g Tr. at pg. 8:1-8).

6 16. On October 15, 2007, TIAA-CREF issued a Memorandum of Garnishee, which
 7 stated that the accumulations may not be garnished as the TIAA B & CREF Q accounts are
 8 excluded from a debtor's bankruptcy estate pursuant to *Patterson v. Shumate*, 504 U.S. 753
 9 (1992), and that the ATRA account is claimed by the debtor as exempt from the claims of
 10 creditors. (June 23, 2008 Hr'g Tr. at pg. 8:5-8, pg. 26:11-15).

11 17. On September 18, 2007, the bankruptcy court granted the debtor's attorney,
 12 Richard G. Fathy's motion to withdraw as attorney. [Docket No. 157].

13 18. On January 9, 2008, the trustee filed an amended objection to the debtor's claims
 14 of exemption and surcharge request. [Docket No. 175].

15 19. On January 16, 2008, the trustee filed a second amended objection to the debtor's
 16 claims of exemption, request for surcharge, and request for order compelling TIAA-CREF to
 17 account for and remit property of the estate and property subject to levy. [Docket No. 178].

18 20. The second amended objection is a contested matter over which this court has
 19 subject matter jurisdiction. *See* 28 U.S.C. § 1334(b) and 11 U.S.C. § 522. It is a core proceeding.
 20 *See* 28 U.S.C. § 157 (b)(2)(A) and (B).

21 21. The notice of the second amended objection complied in all respects with the
 22 requirements of the Bankruptcy Code and the Bankruptcy Rules, and it fully and adequately
 23 described the relief required in the objection and informed parties in interest how to receive all
 24 supporting documentation for the objection. Under the circumstances of this case, the notice of
 25 the objection provided fair and reasonable notice of the objection, the hearing on the objection,
 26 and the deadline and procedures for opposing the objection.

27 22. The objection and the notice of the hearing on the objection, as well as notice of
 28 the deadline for a response to the objection, were duly served on all required and necessary

1 parties, including the debtor, Thomas Alan Daniel, and TIAA-CREF, and their respective
 2 attorneys, if any, and the Office of the United States Trustee. Notice and service was in
 3 accordance with Bankruptcy Rule 4003.

4 23. The court sustains the opposition of TIAA-CREF, and denies the trustee's
 5 requested relief, in part, as follows.

6 24. Pursuant to *Patterson v. Shumate*, 504 U.S. 753 (1992), 11 U.S.C. § 541, and the
 7 anti-alienation provisions of ERISA, the accumulations in the debtor's ERISA-governed TIAA B
 8 & CREF Q accounts are not property of the debtor's chapter 7 bankruptcy estate, and are not
 9 property that is subject to enforcement of a money judgment under applicable state law. (June 23,
 10 2008 Hr'g Tr. at pg. 35:19-22).

11 25. No TIAA B & CREF Q account funds were released and actually paid to and
 12 received by the debtor participant. Pursuant to *Guidry v. Sheet Metal Workers Int'l Assoc.*, 10
 13 F.3d 700, 710-11 (10th Cir. 1993), the debtor's TIAA B & CREF Q account accumulations
 14 remain ERISA-protected. None of the arguments involving the debtor's immediate right of
 15 access to or constructive receipt of the TIAA B & CREF Q accumulations upon his Emory
 16 University employment termination, or the debtor's written distribution request pursuant to the
 17 annuity contract terms, or the mailing of distribution checks to the debtor participant or the
 18 stopping of payment of said checks alter the fact that no TIAA B & CREF Q funds were released.
 19 (June 23, 2008 Hr'g Tr. at pg. 30:12-13, pg. 30:25, pg. 32:10-11, pg. 35:23-25, pg. 36:1-2).

20 26. As the accumulations in the debtor's TIAA B & CREF Q accounts are not
 21 property of the debtor's chapter 7 bankruptcy estate, such accumulations cannot ~~not~~ be
 22 surcharged by the trustee as estate property. Additionally, said accumulations are not subject to a
 23 turn over and accounting request under 11 U.S.C. § 543, which is applicable to estate property.
 24 (June 23, 2008 Hr'g Tr. at pg. 35:23-25, pg. 36:1-2; pg. 38:10-17, pg. 39:14-17).

25 27. As the accumulations in the debtor's TIAA B & CREF Q accounts are not subject
 26 to garnishment, execution, accounting restraint or other process due to the anti-alienation
 27 provisions of ERISA, the California exemption statutes and enforcement of judgments law are
 28 inapplicable to the TIAA B & CREF Q accounts. (June 23, 2008 Hr'g Tr. at pg. 35: 23-25, pg.

1 36:1-2).

2 28. The trustee's objections to the debtor's claimed exemptions for (1) the defined
3 benefit retirement plan at Washington Mutual account number 036100006506206 (June 23, 2008
4 Hr'g Tr. at pg. 36:15); and (2) the St. Louis University 401k retirement account held by American
5 Funds account number 75565216 (June 23, 2008 Hr'g Tr. at pg. 37:9-14), are sustained.

6 29. The trustee's objections to the debtor's claimed exemptions for the ATRA
7 contracts, TIAA D4740470 and CREF V4740477, which were held outside of the ERISA-
8 governed Emory University retirement plan, are sustained. (June 23, 2008 Hr'g Tr. at pg. 36:4-
9 6). TIAA-CREF shall turn over and account for the debtor's accumulations currently held in the
10 ATRA contracts to the trustee pursuant to the distribution restrictions set forth under the terms of
11 the ATRA contracts.

12 30. A separate order will be entered on the trustee's second amended objection.

13
14 Approved as to form and substance by:

15
16 _____
17 J. Russell Cunningham
18 Desmond, Nolan, Livaich & Cunningham
19 Attorneys for the Chapter 7 Trustee
20 Hank M. Spaccone

21 Dated:

22 By the Court

23 _____
24 David E. Russell, Judge
25 United States Bankruptcy Court
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27
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